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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-415

WESLEY WARD,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

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Appellee moves to dismiss or affirm the judgment of the Supreme Court of the State of Illinois, pursuant to Rule 16(1)(b) and (1)(c) of the Rules of this Court.

STATEMENT OF THE CASE

The pertinent facts in the instant cause are fully stated in the opinion by the Supreme Court of Illinois and are adequately summarized in Appellant's Jurisdictional Statement. Where necessary, further factual references will be made in the course of argument.

ARGUMENT

I.

THE ILLINOIS OBSCENITY STATUTE, CHAPTER 38, SECTION 11-20, ILLINOIS REVISED STATUTES, MEETS THE SPECIFICITY REQUIREMENT ANNOUNCED IN MILLER v. CALIFORNIA, 413 U.S. 15 (1973).

A.

The Illinois Obscenity Statute As Construed By The Illinois Supreme Court Prior To The Miller Decision, Adequately Defines The Kinds Of Sexual Portrayals That Are Regulated.

This Court's now well known examples of language a state statute could employ to meet the *Miller* specificity requirement are:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 93 S. Ct. at 2613.

The Illinois Statute presently under attack does delineate the forms of sexual conduct that are subject to regulation. Chapter 38, Section 11-20 states in pertinent part:

> (b) Obscene Defined.
>
> A thing is obscene if, considered as a whole, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in *nudity, sex* or *excretion,* and if it goes substantially beyond customary limits of

> candor in description or representation of such matters . . . (emphasis added).

Prior to *Miller,* the Illinois Supreme Court had occasion to further define the type of sexual portrayals covered by the statute. *People* v. *Sikora,* 32 Ill. 2d 260 (1965) held that descriptions of intercourse, oral-genital contact, masturbation, self-fondling, rape, lesbian intercourse, cunnilingus, flagellation and lesbian foreplay may be found obscene under the statute. Exhibition of the genitals is also subject to regulation but only when such exhibition can be described as lewd or predominately appealing to prurient interests. See, *City of Geraci,* 46 Ill. 2d 576 (1970); *People* v. *Biocic,* 224 N.E. 2d 572 (Ill. App. 1967); (nudity without lewdness is not obscene); *People* v. *Ridens,* 51 Ill. 2d 501 (1972). Representations of normal and abnormal sexual conduct are proscribed. *City* v. *Geraci,* 46 Ill. 2d 576, 582 (1970). Of course only "patently offensive" representations are subject to control. *People* v. *DeVilbiss,* 41 Ill. 2d 135, 141 (1968); *Chicago* v. *Universal Pub. and Dis. Corp.,* 34 Ill. 2d 250 (1966). It becomes apparent that the Illinois Obscenity Statute as construed prior to *Miller* virtually parallels the regulatory language suggested by the *Miller* court. Indeed, the Illinois statute as construed is more detailed than the suggested language of *Miller* in describing the forms of sexual conduct that may be found obscene. It is submitted that Chapter 38, section 11-20 as construed prior to *Miller* sufficiently describes the kinds of specific sexual conduct which can be found obscene and therefore complies with the specificity standard of *Miller.*

B.

Even Assuming That The Construction Placed On The Illinois Obscenity Statute By The Illinois Supreme Court Prior To Miller Was Insufficient To Meet The Miller Specificity Standard, Such Specificity Has Been Incorporated Into The Statute By The Illinois Supreme Court In Its Decisions Subsequent To Miller.

In *Miller*, this court stressed the fact that needed specificity could be added to obscenity statutes through judicial construction by state courts of last resort. 413 U.S. at pp. 25, 26, 28 and Note 6. Judicial construction of obscenity statutes to bring them into line with *Miller* was accomplished or approved by this Court in *Hamling* v. *U.S.*, 418 U.S. 87 (1974), and *Miller* v. *California II*, 418 U.S. 915 (the second appeal of the *Miller* case, after the California courts had construed and upheld their statute following this Court's remand in *Miller I*).

Accordingly, since the *Miller* decision, the Illinois Supreme Court has three times construed the Illinois Obscenity statute.

In *People* v. *Ridens II*, 59 Ill. 2d 362, 321 N.E.2d 264 (1974) the Court sought to read the *Miller* formulae into the statute. In their lengthy *Ridens II* Opinion, the Illinois Supreme Court quoted the operative passages of *Miller* pp. 24-26 in their entirety including the examples of obscenity, and then said: "It suffices to, and we now construe §11-20 of the Criminal Code and the Moline obscenity ordinance to incorporate parts (a) and (b) of the *Miller* standards." 59 Ill. 2d at 371; *cert. den.*, 421 U.S. 993.

Appellants herein contend that *Ridens II* does not specifically refer back and give specific incorporation to the

examples of what a state statute could define for regulation found in *Miller*, and therefore the statutory construction is deficient. Such a contention ignores the plain language of *Ridens II*, cited above and the obscenity decisions of the Illinois Supreme Court after *Ridens II*.

In *People* v. *Gould*, 60 Ill. 2d 159, 324 N.E.2d 412 (1975) the Illinois Court analyzed its position *vis-a-vis Miller*:

> "In *Miller* v. *California*, the Supreme Court in describing the constitutional guidelines for the regulation of obscene material said . . .:
>
> > "• • • State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulations to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
> >
> > The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (c) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. • • •
> >
> > We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of

what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.'

At the direction of the Supreme Court of the United States, in *People* v. *Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (hereafter Ridens II), we consider further, in light of *Miller*, our earlier judgment in *People* v. *Ridens*, 51 Ill.2d 410, 282 N.E.2d 691 (Ridens I). We held in Ridens II that our obscenity statute (Ill. Rev. Stat. 1969, ch. 38, par. 11-20) remained unconstitutional, we construed our statute to incorporate parts of guidelines (a) and (b) of the *Miller* standards (*which are set out in the above quotation from Miller*) and stated that under our statute the third question or guideline which must be considered in determining whether the matter or work is obscene is whether it is 'utterly without redeeming social value.' We explained that the more restrictive guideline (c), or part (c), of the *Miller* standard, *i.e.*, whether 'the work, taken as a whole, lacks serious literary, artistic, political, or scientific value' cannot be used. See Ridens II."

People v. *Gould*, 324 N.E.2d at 414-15, (emphasis added) (citations omitted).

The Illinois Supreme Court's reprinting of all the operative *Miller* passages and reincorporation of the guidelines "which are set out in the above quotation" clearly demonstrate that this Court's specific examples of obscenity were read into the Illinois obscenity statute in *Ridens II* and *Gould*.

The same general technique employed by the Supreme Court of Illinois to incorporate the *Miller* examples of prohibited obscenity into ch. 38, §11-20 was used by this Court to save a federal obscenity statute in *Hamling* v. *U.S.*, 418 U.S. 87 (1974). The *Hamling* decision did not in so many words repeat and adopt *Miller's* list of obscene types of materials. It simply stated:

"As noted above, we indicated in *U.S.* v. *12 200-ft. Reels of Film*, supra, 413 U.S. at 130 n.7, 93 S.Ct. at 2670, that we were prepared to construe the generic terms in 18 U.S.C. 1462 to be limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California*.' We now so construe the companion provision in 18 U.S.C. 1461, the substantive statute under which this prosecution was brought. As so construed, we do not believe that petitioner's attack on the statute as unconstitutionally vague can be sustained." 418 U.S. at 115.

This is essentially what the Illinois Supreme Court said in *Ridens II* and *Gould, supra*, when it reprinted the governing portions of *Miller*, including the examples, and then construed ch. 38, §11-20 to include those requirements. Therefore, the method of incorporation used by the Illinois Court was effective and proper, and it precludes a successful attack on the statute's constitutionality.

II.

THE PUBLICATIONS INVOLVED IN THE INSTANT CASE ARE NOT PROTECTED BY THE FIRST AMENDMENT SINCE THEY ARE OBSCENE.

Two publications are involved in the instant case, "Illustrated Case Histories, A Study of Sado-Masochism," Vol. 3, No. 1, and "Bizarre World, Number One."

"Illustrated Case Histories, A Study of Sado-Masochism," consists of black and white and color photographs portraying nude males and females engaged in seductive embraces, posed so as to focus attention on their genitals. Sexual activity is suggested and imminent in most of the photographs. The models have their hands and mouths close to, or touching each others genitals, suggesting abnormal sexual activity. Chains, ropes, whips, cigarettes, scissors, etc., are portrayed in the photographs in connection with such sexual activities. Captions are included with many of the pictures extolling the virtues of sex accompanied by physical torture.

"Bizarre World, Number One," consists of black and white and color photographs of partially clothed and naked males and females. Some of the pictures suggest that sexual activity is imminent. (See "Bizarre World, Number One" at pp. 34, 70). Many of the photographs focus on the genitals of the models, and in some, whips are shown against the male genitals. Using whips, ropes, high heeled shoes, nets, male and female models, captions and articles, the magazine attempts to advance the cause of sex accompanied by torture.

The magazines involved herein, appeal to a shameful and morbid interest in nudity and sex and are therefore obscene.

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal in this case or affirm the judgment of the Illinois Supreme Court.

Respectfully submitted,

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